

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) P. & S. Docket No. D-12-0131
)
Sammy Simmons and Wendy)
Simmons, d/b/a People's)
Livestock of Cartersville,)
)
Respondents) **Decision and Order**

PROCEDURAL HISTORY

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on December 21, 2011. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; the regulations issued under the Packers and Stockyards Act (9 C.F.R. pt. 201) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges: (1) Sammy Simmons and Wendy Simmons violated the cease and desist order issued in *In re Sammy and Wendy Simmons*, 66 Agric. Dec. 731 (2007); (2) during the period December 1, 2008, to January 31, 2009, Sammy Simmons and Wendy Simmons sold livestock on commission and, in purported payment of the net proceeds of those sales, issued at least 50 checks to consignors for livestock consigned to Sammy Simmons and Wendy Simmons' market for sale which checks were returned unpaid by the bank upon which the checks were drawn because Sammy Simmons and Wendy Simmons did not have and maintain sufficient funds on deposit and available, in the accounts upon which those checks were drawn, to pay the checks when presented, in willful violation of 7 U.S.C. §§ 208 and 213(a) and 9 C.F.R. § 201.43; (3) during the period December 1, 2008, to January 31, 2009, Sammy Simmons and Wendy Simmons sold livestock on commission and failed to remit, when due, the net proceeds from the sale price of those livestock, in willful violation of 7 U.S.C. §§ 208 and 213(a) and 9 C.F.R. § 201.43; and (4) as of January 31, 2009, Sammy Simmons and Wendy Simmons had a deficiency in their custodial account of \$104,710.11, in willful violation of 7 U.S.C. §§ 208 and 213(a) and 9 C.F.R. § 201.42.¹

¹Compl. ¶¶ II-V.

The Hearing Clerk served Sammy Simmons and Wendy Simmons with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on January 25, 2012.² Neither Sammy Simmons nor Wendy Simmons filed an answer to the Complaint within 20 days after the Hearing Clerk served them with the Complaint, as required by 7 C.F.R. § 1.136(a). The Hearing Clerk sent a letter, dated February 27, 2012, to Sammy Simmons and Wendy Simmons informing them that an answer to the Complaint had not been filed within the time prescribed by the Rules of Practice. Neither Sammy Simmons nor Wendy Simmons responded to the Hearing Clerk's February 27, 2012, letter.

On March 27, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] issued a Show Cause Order in which he provided the parties 15 days within which to show cause why a default decision should not be entered. On April 12, 2012, the Deputy Administrator filed a response to the Chief ALJ's Show Cause Order in the form of a Motion for Decision Without Hearing by Reason of Default and a proposed Decision Without Hearing by Reason of Default. On May 8, 2012, Sammy Simmons and Wendy Simmons filed a response to the Deputy Administrator's Motion for Decision Without Hearing by Reason of Default stating they were no longer in the business of selling livestock on

²Hearing Clerk's Memorandum To The File, dated January 25, 2012, regarding service on Wendy Simmons; Hearing Clerk's Memorandum To The File, dated January 25, 2012, regarding service on Sammy Simmons.

commission and they were unable to pay the \$58,000 civil penalty requested in the Deputy Administrator's Motion for Decision Without Hearing by Reason of Default.

On May 30, 2012, the Chief ALJ, in accordance with 7 C.F.R. § 1.139, issued a Default Decision and Order: (1) concluding Sammy Simmons and Wendy Simmons willfully violated 7 U.S.C. §§ 208 and 213(a) and 9 C.F.R. §§ 201.42-.43, as alleged in the Complaint; (2) ordering Sammy Simmons and Wendy Simmons to cease and desist from violations of the Packers and Stockyards Act and the Regulations; (3) suspending Sammy Simmons and Wendy Simmons as registrants under the Packers and Stockyards Act for 5 years; and (4) assessing Sammy Simmons and Wendy Simmons a \$58,000 civil penalty.³

On August 8, 2012, Sammy Simmons and Wendy Simmons appealed the Chief ALJ's Default Decision and Order to the Judicial Officer. On September 7, 2012, the Deputy Administrator filed Complainant's Response to Respondent's [sic] Appeal Petition. On September 14, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I adopt, with minor changes, the Chief ALJ's Default Decision and Order as the final agency decision.

DECISION

³Chief ALJ's Default Decision and Order at 4-5.

Statement of the Case

Neither Sammy Simmons nor Wendy Simmons filed a timely answer to the Complaint.

Pursuant to 7 C.F.R. § 1.136(c), the failure to file a timely answer is deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact, and I issue this Decision and Order pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Sammy Simmons is an individual residing in Cartersville, Georgia.
2. At all times material to this proceeding, Sammy Simmons:
 - (a) was a 51% owner and operator in the general partnership of People's Livestock of Cartersville;
 - (b) was registered, with Wendy Simmons, with the United States Department of Agriculture as a market agency selling livestock on commission;
 - (c) was responsible, with Wendy Simmons, for the day-to-day management, operation, and control of People's Livestock of Cartersville;
 - (d) purchased and sold livestock;
 - (e) sold livestock on commission; and

(f) was a market agency and dealer within the meaning of the Packers and Stockyards Act and the Regulations.

3. Wendy Simmons is an individual residing in Cartersville, Georgia.

4. At all times material to this proceeding, Wendy Simmons:

(a) was a 49% owner and office manager in the general partnership of People's Livestock of Cartersville;

(b) was registered, with Sammy Simmons, with the United States Department of Agriculture as a market agency selling livestock on commission;

(c) was responsible, with Sammy Simmons, for the day-to-day management, operation, and control of People's Livestock of Cartersville; and

(d) was a market agency within the meaning of the Packers and Stockyards Act and the Regulations.

5. In *In re Sammy and Wendy Simmons*, 66 Agric. Dec. 731 (2007), Sammy Simmons and Wendy Simmons were ordered to cease and desist from:

(a) issuing checks to consignors or shippers of livestock that are returned unpaid by the bank upon which the checks are drawn because Sammy Simmons and Wendy Simmons do not have or maintain sufficient funds on deposit and available, in the account upon which the checks are drawn, to pay the checks when presented; and

(b) failing to remit the full amount of the net proceeds due from the sale price of livestock sold on commission within the time period required by 9 C.F.R. § 201.43.

6. During the period December 1, 2008, to January 31, 2009, Sammy Simmons and Wendy Simmons sold livestock on commission and, in purported payment of the net proceeds of those sales, issued at least 50 checks to consignors for livestock consigned to Sammy Simmons and Wendy Simmons' market for sale which checks were returned unpaid by the bank upon which the checks were drawn because Sammy Simmons and Wendy Simmons did not have and maintain sufficient funds on deposit and available, in the accounts upon which those checks were drawn, to pay the checks when presented.

7. Sammy Simmons and Wendy Simmons, in the transactions described in Finding of Fact number 6, failed to remit, when due, the net proceeds due from the sale price of livestock sold on commission.

8. As of January 31, 2009, Sammy Simmons and Wendy Simmons had outstanding checks drawn on their custodial account in the amount of \$125,019.33, and had to offset those checks, a balance in their custodial account of negative \$3,205.13, proceeds receivable of \$8,485.75, and deposits in transit in the amount of \$15,028.60, resulting in a deficiency of \$104,710.11.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. Sammy Simmons and Wendy Simmons willfully violated 7 U.S.C.

§§ 208 and 213(a) and 9 C.F.R. §§ 201.42-.43.

3. Sammy Simmons and Wendy Simmons willfully violated the cease and desist order issued in *In re Sammy and Wendy Simmons*, 66 Agric. Dec. 731 (2007).

Sammy Simmons and Wendy Simmons' Appeal Petition

Sammy Simmons and Wendy Simmons raise one issue in their appeal petition.

Sammy Simmons and Wendy Simmons request that I reduce or eliminate the \$58,000 civil penalty assessed by the Chief ALJ because they are not able to pay a civil penalty of \$58,000.

The Secretary of Agriculture's sanction policy is as follows:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

In re S.S. Farms Linn County, Inc. (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993). Pursuant to 7 U.S.C. § 213(b), the Secretary of Agriculture must also consider “the gravity of the offense, the size of the business involved, and the effect of the penalty on the person’s ability to continue in business.”

Sammy Simmons and Wendy Simmons assert they no longer own or manage People’s

Livestock of Cartersville, and they no longer sell livestock on commission;⁴ therefore, when reviewing the \$58,000 civil penalty assessed by the Chief ALJ, I do not consider the size of Sammy Simmons and Wendy Simmons' business or the effect of the civil penalty on Sammy Simmons and Wendy Simmons' ability to continue in business.

⁴Sammy Simmons and Wendy Simmons' Appeal Pet.; Sammy Simmons and Wendy Simmons' response to the Deputy Administrator's Motion for Decision Without Hearing by Reason of Default.

As for the gravity of Sammy Simmons and Wendy Simmons' violations of the Packers and Stockyards Act and the Regulations, I find their violations were serious. Sammy Simmons and Wendy Simmons were market agencies who had a duty to remit to livestock consignors the net proceeds due from the sales price of livestock sold on commission. Sammy Simmons and Wendy Simmons were in a position of trust and the funds they held were trust funds.⁵ In addition, Sammy Simmons and Wendy Simmons' failure, as market agencies, to maintain their custodial account in accordance with 9 C.F.R. § 201.42 is an unfair and deceptive practice in violation of the Packers and Stockyards Act.⁶ Sammy Simmons and Wendy Simmons violated the trust of livestock sellers by (1) issuing at least 50 insufficient funds checks, (2) failing to remit, when due, the net proceeds due from the sale price of livestock sold on commission, and (3) allowing a \$104,710.11 deficiency in their custodial account.

Moreover, Sammy Simmons violated two previously issued cease and desist orders and Wendy Simmons violated one previously issued cease and desist order. In *In re Sammy and Wendy Simmons*, 66 Agric. Dec. 731 (2007), Sammy Simmons and Wendy Simmons were ordered to cease and desist from: (1) issuing checks to consignors or shippers of livestock

⁵9 C.F.R. § 201.42.

⁶*In re Finger Lakes Livestock Exchange, Inc.*, 48 Agric. Dec. 390, 398 (1989); *In re Harry C. Hardy*, 33 Agric. Dec. 1383, 1400 (1974).

that are returned unpaid by the bank upon which the checks are drawn because Sammy Simmons and Wendy Simmons do not have or maintain sufficient funds on deposit and available, in the account upon which the checks are drawn, to pay the checks when presented; and (2) failing to remit the full amount of the net proceeds due from the sale price of livestock sold on commission within the time period required by 9 C.F.R. § 201.43. In that 2007 proceeding, Sammy Simmons and Wendy Simmons were assessed a \$6,000 civil penalty for their issuance of nine non-sufficient funds checks. In *In re Samuel Gail Simmons*, 54 Agric. Dec. 1209 (1995), Sammy Simmons was ordered to cease and desist from paying for livestock with checks returned for non-sufficient funds.⁷

⁷See *In re Sammy and Wendy Simmons*, 66 Agric. Dec. 731, 734 (2007) (discussing the cease and desist order issued in *In re Samuel Gail Simmons*, P&S Docket No. D-94-15 (Aug. 31, 1995)).

In light of the number and gravity of Sammy Simmons and Wendy Simmons' violations of the Packers and Stockyards Act and the Regulations, Sammy Simmons and Wendy Simmons' violations of previously issued cease and desist orders, and the Deputy Administrator's recommendation that the Chief ALJ assess Sammy Simmons and Wendy Simmons a \$58,000 civil penalty,⁸ I conclude the \$58,000 civil penalty assessed by the Chief ALJ is justified by the facts. Moreover, the civil penalty is warranted in law. The maximum civil penalty that the Secretary of Agriculture may assess for each of Sammy Simmons and Wendy Simmons' violations of the Packers and Stockyards Act is \$11,000.⁹ Therefore, I reject Sammy Simmons and Wendy Simmons' request that I reduce or eliminate the \$58,000 civil penalty assessed by the Chief ALJ.

For the foregoing reasons, the following Order is issued.

ORDER

⁸Deputy Administrator's Motion for Decision Without Hearing by Reason of Default at second unnumbered page.

⁹The Packers and Stockyards Act provides that the maximum civil penalty that the Secretary of Agriculture may assess for each violation of 7 U.S.C. § 213(a) is \$10,000 (7 U.S.C. § 213(b)). However, the maximum civil penalty that the Secretary of Agriculture may assess for each violation of 7 U.S.C. § 213(a) has been modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), and various implementing regulations issued by the Secretary of Agriculture. During the period December 1, 2008, to January 31, 2009, when Sammy Simmons and Wendy Simmons violated the Packers and Stockyards Act and the Regulations, the maximum civil penalty for each violation of 7 U.S.C. § 213(a) was \$11,000 (7 C.F.R. § 3.91(b)(6)(iv) (2010)).

1. Sammy Simmons and Wendy Simmons, their agents and employees, directly or indirectly through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

a. failing to pay the full amount of the net proceeds due from the sale price of livestock sold on commission, within the time period required by 9 C.F.R. § 201.43;

b. issuing checks to consignors or shippers of livestock which are returned unpaid by the bank upon which the checks are drawn because Sammy Simmons and Wendy Simmons do not have and maintain sufficient funds on deposit and available, in the accounts upon which the checks are drawn, to pay the checks when presented; and

c. failing to maintain a Custodial Account for Shippers' Proceeds in conformity with 9 C.F.R. § 201.42.

Paragraph 1 of this Order shall become effective 5 days after service of this Order on Sammy Simmons and Wendy Simmons.

2. Sammy Simmons and Wendy Simmons are suspended as registrants under the Packers and Stockyards Act for a period of 5 years.

Paragraph 2 of this Order shall become effective 60 days after service of this Order on Sammy Simmons and Wendy Simmons.

3. Sammy Simmons and Wendy Simmons are assessed a \$58,000 civil penalty.

Payment of the civil penalty shall be made by certified check or money order, made payable to the “Treasurer of the United States,” and sent to:

USDA-GIPSA
PO Box 790335
St. Louis, Missouri 63179-0335

Payment of the civil penalty shall be sent to, and received by, USDA-GIPSA within 60 days after service of this Order on Sammy Simmons and Wendy Simmons who shall state on the certified check or money order that payment is in reference to P. & S. Docket No. D-12-0131.

RIGHT TO JUDICIAL REVIEW

Sammy Simmons and Wendy Simmons have the right to seek judicial review of this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Judicial review must be sought within 60 days after entry of the Order in this Decision and Order.¹⁰ The date of entry of the Order in this Decision and Order is September 20, 2012.

Done at Washington, DC

September 20, 2012

¹⁰28 U.S.C. § 2344.

William G. Jenson
Judicial Officer